

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SBM MANAGEMENT SERVICES)	
)	
Respondent)	Case Nos.: 05-CA-129128
)	 05-RC-126500
-and-)	
)	
INTERNATIONAL CHEMICAL WORKERS)	
UNION COUNCIL, UFCW)	BRIEF IN SUPPORT OF
)	UNION’S CROSS-EXCEPTIONS
)	
Charging Party)	

Now comes the Charging Party, the International Chemical Workers Union Council/United Food and Commercial Workers (Union), by and through the undersigned counsel, and hereby timely files the following brief in support of its cross-exceptions to the Decision of Administrative Law Judge Arthur J. Amchan (Judge) issued in the above-captioned matter on December 8, 2014, said cross-exceptions being filed simultaneously herewith and incorporated herein by reference.

I. INTRODUCTION

The essence of these cross-exceptions is not only whether Respondent, SBM Management Services (Respondent, Employer, or SBM), violated Section 8(a)(1) and also engaged in objectionable conduct warranting the setting aside of the results of the May 22, 2014, election, thereby justifying the ordering of a rerun election, when it gave not insignificant “Great Job” bonuses to approximately 9 employees on May 16, 2014, in front of almost all of the potential unit employees in a unique and dramatic manner and distributed bonuses to 2 more unit members the next day – the Administrative Law Judge (Judge) found Respondent had violated the Act and engaged in such

objectionable conduct – but whether the recommended remedy is adequate to serve the purposes of the Act. While the Union supports the order for a re-run election and the finding that SBM committed an unfair labor practice, the Union submits that the recommended remedy is not sufficient to adequately extinguish SBM’s sins from the employees’ minds and dissipate the coercive effects of SBM’s unlawful activity.

II. STATEMENT OF THE FACTS

In October 2013, Respondent SBM became the custodial contractor for a Merck & Co. facility in Elkton, Virginia, replacing E.A. Breeden. (JD, p. 2, lines 25-27). (References to the December 8, 2014, ALJ Decision in the above-referenced case will be cited as “(JD, p. ____, lines ____). SBM -- companywide -- has no formal policy for paying bonuses. (JD, p. 3, line 27).

On April 14, 2014, the Union filed a representation petition seeking to represent a unit for the first time of the Respondent’s custodial staff, floor technicians, glassware technicians and GMP cleaning technicians. Eventually, a representation election was scheduled for and held on May 22, 2014. (JD, p. 1, lines 34-35; p. 2, lines 30-32).

SBM has conducted regular safety meetings for its employees on Fridays. It held such a meeting on Friday, May 16, 2014, six days before the representation election. (JD, p. 2, lines 34-36).

Almost all of Respondent’s about 27 potential unit employees were present at this meeting. (JD, p. 1, lines 35-38; p. 2, lines 38-39). SBM provided pizza for the employees at this safety meeting, which it did not do at all such meetings. (JD, p. 3, lines 1-2).

SBM did something else dramatic and unique at this May 16 pre-election meeting. Even though the Judge found that SBM had not given out [Great Job] bonuses to any employee at Elkton prior to May 16 (JD, p. 3, line 14) (bracketed material added) -- and certainly not in the following-

described fashion -- SBM at this meeting called 9 employees -- about a third of the unit -- to the front of the room before almost all of the rest of the potential unit, told these select employees to close their eyes, and hold out their hands. Site Manager Ruben Chavez, the highest on-side management official (JD, p. 3, lines 27-29), then placed a bonus check in each of these 9 employees' hands. Eight of the employees received a \$100 check and one employee received a \$75 check. Since these employees typically earned regular pay of about \$300 or so for a 40-hour week (probably net), these bonuses were significant amounts for them. Two other employees, who were not present at the meeting, received a \$100 bonus each the next day. (JD, p. 3, lines 5-8)(T. 52).^{1/}

The Judge found that, since the distribution of bonuses in this case was supposed to be, and was in fact a surprise, this was a strong indication that such bonuses at this facility was not an established past practice and that, instead, it reasonably would be understood by the employees as a means, in part, to influence their votes in the election just 6-days later. (JD, p. 4, lines 19-23).

The Judge also found that there was no reason -- ***and SBM has offered none*** -- why SBM could not have waited until after the election to give out these bonuses to reward its employees, *i.e.* just waited 7 more days! Since the bonuses purportedly were given in part for work done at least 2 or more weeks prior to May 16, he found that, if SBM truly wanted to reward its employees without coercing them in the exercise of their Section 7 rights, SBM easily could have waited another week until after the election to distribute the bonus checks (JD, p. 4, lines 36-40) and, of course, it could have done so in a much less theatrical fashion.

More importantly, the Judge found that rewarding the individual employees -- about a third

^{1/}Even if these employees' typical weekly pay were closer to four hundred per week, gross, as SBM contends, a \$100 check, apparently net, still is not an insignificant amount for such low-paid employees, as the Judge recognized. (JD, p. 5, line 17).

of the potential unit -- in front of almost all of the other unit employees was a significant departure from SBM's prior practice at the Elkton site and was done to influence their votes in the upcoming representation election. (JD, p. 4, lines 42-45).

As such, the Judge found that this action violated Section 8(a)(1), constituted objectionable conduct, and ordered a re-run election. His recommended order, however, could be avoided, at least in part, particularly if SBM should lose its contract to provide maintenance at the Merck facility, though, even if it should not, former employees, who were present for the unlawful activity, may never know it has been remedied, or ever see the Notice.

III. LAW AND ARGUMENT

Cross-Exception No. 1: The Judge, in issuing his remedy, failed to take into account the situation that might occur if the Respondent should lose its contract at the facility and, thereby, prevent Respondent SBM from posting the Notice, even if the facility remains open with a different contractor.

Respondent SBM is a contractor at the facility that provides certain custodial and maintenance services. Indeed, SBM had only replaced a prior contractor, E.A. Breeden, in October, 2013. (JD, p. 2, lines 25-26). Consequently, it is possible that, during these proceedings and before compliance, SBM, for whatever reason, while remaining in business, still could cease to be the contractor providing services at the facility involved in these proceedings and, therefore, it would not be able to post the Notice at this facility. The Notice-posting requirement implicitly assumes that that the employer and the operator of the facility are the same, when they are not. Respondent merely, as a contractor, merely provides maintenance services for the operator of the facility, Merck. If SBM is no longer the contractor, the Order does not necessarily require SBM to mail the Notice to its employees or former employees.

Under the remedial order, as now written, the notice-posting requirement, while arguably running against successors and assigns, still may never be seen by any of SBM's current or former employees, if SBM loses its contract and its replacement fails to hire all, or any, of SBM's work force, or if the new contractor takes over without notice of SBM's unfair labor practice. The subsequent contractor, then, may not be deemed a "successor or assign" as that term is understood or applied under Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973). Thus, since the Order does not require SBM to mail the Notice to current, or former SBM employees, in the event that it should lose its contract, there then will be no complete, or effective, remedy conveyed to the employees most affected by the unlawful activity, *i.e.*, those who attended the May 16 meeting!

The Order needs to be revised accordingly so as to require the Notice to be mailed at least in such a situation to all current or former SBM employees.

Cross-Exception No. 2: The Judge should have required SBM to mail copies of the Notice to all former SBM employees, who had been employed as of the date of the unfair labor practice.

Since May 16, 2014 -- the date when SBM dramatically and unlawfully paid bonuses to about a third of the unit in front of almost all of the rest of the unit -- a number of SBM employees have either been terminated, or otherwise left SBM employment, at the facility, or may leave such employment prior to compliance. In his Order, the Judge recognized that, if the Respondent goes out of business, or the facility closes, it should duplicate and mail the Notice to all current employees and former employees employed by it at any time since May 16, 2014, presumably even employees who were employed by it after May 16, 2014. The Union has no quarrel with this portion of the Order as far as it goes; it just does not go far enough.

Curiously, under the Order, as it now stands, for those employees who were present at the meeting when SBM committed its unlawful acts, but, for one reason or another, are, or may, no longer be employed by SBM at this facility by the time of compliance, they may never know that these unlawful acts have been remedied *if the facility remains open*, or SBM remains the contractor there. It makes little sense logically to require -- as does the Order -- the mailing of the Notice to subsequently-hired employees, who were never present during unlawful distribution of the bonuses, if the facility is no longer in business or is closed, but does not require the mailing of the Notice, *when the business may still be open*, to those former employees at the meeting who witnessed the unlawful acts, or requires mailing former employees only if the business is closed!

The Order should be modified to require SBM to duplicate and mail, at its own expense, a copy of the Notice to all former SBM employees employed by SBM at any time since May 16, 2014, and/or at least to those former employees, *who were present at the meeting on May 16, 2014*, at which the unlawful acts occurred, regardless of whether SBM remains in business, retains its contract at the facility, and regardless of whether the facility remains open or is closed!

Cross-Exception No. 3: The Judge should have required SBM to read the Notice to current employees at a meeting similar to the meeting at which it violated the Act.

The manner in which SBM's "highest ranking on-site official in the presence of almost the entire bargaining unit in a rather dramatic fashion" rewarded individual employees with bonuses "in front of all others was a significant departure from [SBM's] prior practice at the Elkton site." (JD, p. 4, lines 42-43; p. 5, lines 17-19). Instead of just waiting seven (7) more days to distribute such bonuses for the first time -- when it already had waited at least two (2) weeks or more after the work for which it purportedly provided the bonuses -- SBM, instead, chose to use its regular Friday safety

meeting for other purposes; uncharacteristically provided pizza for everyone; and, then, dramatically and surprisingly called a third of the bargaining unit up in front of nearly the rest of the entire bargaining unit; told these 9 employees to close their eyes and put out their hands. Then, the highest ranking on-site management official, for the first time ever, placed a “not insignificant [bonus check] compared to the employees’ weekly wages” in each of their hands. (JD, p. 5, lines 17-18). Never before had anything so dramatic of this nature been done at this facility or, apparently, at any other SBM facility! It clearly was a significant departure from any past practice at the Elkton facility of *how* it paid bonuses, even if one were to accept SBM’s weak claims that it had a past practice of paying any type of bonuses. (JD, p. 4, lines 42-43).

Significantly, SBM has never even attempted to explain not only why it handled this matter in such a dramatic departure from what it contends was a past-practice of paying bonuses, but why it did not simply wait just another seven (7) days to pay the bonus and avoid any question about its motive.

The Union submits that, merely posting a piece of paper on a bulletin board, where employees may never even read such a Notice, does little, if anything, to sufficiently remedy such a physically dramatic and visually electrifying violation of the Act. Certainly, it is not sufficient to wash away the embedded memories of such a jolting event performed by a high-ranking official before almost the entire unit. Carey Salt Co., 360 NLRB No. 38 (2014). SBM chose the method it chose to deliver the bonuses because it was dramatic; because it would impress; and, more importantly, because it would be effective!

In order to remedy such a theatrical and dramatic violation of the Act, the remedy should be something *in kind* to likewise be effective, *i.e.*, the Respondent Employer’s highest on-site official

should be required at a similar meeting of employees to read the remedial Notice to them ... pizza not required. Otherwise, the dramatic coercive effects of the Respondent's unlawful activity will not be adequately dissipated.

Cross-Exception No. 4: The Notice should be conformed to be consistent with the Order.

The Order in part requires the Respondent to cease and desist from: “(b) In *any other manner* interfering with ...” (JD, p. 6, line 6-7)(emphasis added). However, the Notice is not consistent with the Order in that it states that, in part:

“WE WILL NOT in any *like or related manner* interfere with...”

(JD, Appendix, Notice, Second “WE WILL NOT”) (bold italics added). Consequently, the Notice should be conformed to be consistent with the Order, *i.e.*, the Notice should similarly read: “WE WILL NOT in any other manner...”

Cross-Exception No. 5: The Judge should not have admitted Respondent Exhibits 4 and 5.

Over the Counsel for the General Counsel's objections, the Judge admitted Respondent Exhibits 4 and 5. In doing so, he erred. (T. 171-85).

First, the documents, particularly as they included information regarding facilities other than the Elkton, Virginia, facility, were irrelevant.^{2/} DMI Distribution of Delaware, Ohio, Inc., 334 NLRB 409, 411 (2001) (Past practices at other facilities not relevant). Significantly, there was no showing by SBM that the potential unit employees were aware of any consistent past practice of paying

^{2/}The Counsel for the General Counsel would not have objected to the admission of Respondent Exhibit 5, at least on one ground, if information regarding facilities other than Elkton, had been redacted. (T. 181, line 16-19). That information was not redacted, nor was similar information redacted from Respondent Exhibit 4.

“Great Job” bonuses at SBM facilities other than the Elkton facility. Even if Supervisor Turner had some hearsay knowledge of some sort of other type of *ad hoc* bonus practice at other SBM facilities, that says nothing about the potential unit employees’ knowledge about such practices elsewhere. In fact, Elkton was the only location where SBM employees did Triple cleans. (T. 163), so there would not be a practice elsewhere for bonuses for doing such work well. Furthermore, each site had its own incentive policy and SBM had no companywide bonus policy. (T. 8, 137). Consequently, whatever practices SBM may have had, or not had, elsewhere were irrelevant.

Second, the documents, as Counsel for General Counsel adequately argued prior to them being admitted, were inadequately identified and described and, thus, were of little value to the record; it was not even clear from a witness, as opposed to from Respondent counsel’s statements, that the exhibits described payments made solely by or on behalf of SBM, nor the locations for which the payments were being made. (T. 171-81, 185). For the reasons argued by Counsel for the General Counsel at the hearing (T. 171-81), then, those exhibits should not have been admitted.

IV. CONCLUSION

For the reasons stated above, the Union’s cross-exceptions, in whole or in part, should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been sent this 3rd day of February, 2015, via email to the following:

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